FILED
NOV 8 1991

No. 91-611

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KEYTON E. BARKER and
PAULINE BARKER, *et al.*,
Petitioners,

v.

STATE OF KANSAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE RETIRED OFFICERS ASSOCIATION IN SUPPORT OF PETITIONERS

EUGENE O. DUFFY *
GREGORY W. LYONS
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Amicus

* Counsel of Record

November 8, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-611

KEYTON E. BARKER and
PAULINE BARKER, *et al.*,
Petitioners,

v.

STATE OF KANSAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF THE RETIRED OFFICERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Petitioners have consented to the filing of the brief. The consent of the Respondents was requested but refused.

INTEREST OF *AMICUS*

Amicus is The Retired Officers Association ("TROA").[1] TROA is a nonprofit association having its principal place of business in Alexandria, Virginia. Founded in 1929, its membership now includes 374,000 members living throughout the fifty states, Puerto Rico, Guam, the Republic of the Philippines, and various foreign countries.[2] Its members include past and present, active and reserve, commissioned and warrant officers in the seven Uniformed Services of the United States. TROA is dedicated to maintaining a strong national defense and has been a major advocate on matters involving a broad spectrum of issues related to the preservation of rights and benefits earned through years of dedicated service by both active and retired military personnel.[3]

The State of Kansas and approximately twenty other states have taxed military retirement compensation while exempting from state taxation the retirement benefits of state annuitants. The question presented in this case—whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired military members—is vitally important to *amicus*. If such an exception is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be abridged by the application of conflicting state common law standards of review. Moreover, in the specific context of the

---

[1] Set forth in Appendix A is a list of nineteen additional military associations who have joined with TROA in submitting this motion and accompanying brief.

[2] The interests of more than 1,000,000 retired members of the Uniformed Services of the United States are represented by the military associations who have joined in filing this motion and brief.

[3] Each of the military associations joining in this motion and brief share this common purpose.

issue involved in this case, the announcement of the decision below has caused the needless protraction of litigation in other states involving this Court's decision in the case of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989).[4]

Amicus has supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. Thus, *amicus* has a unique perspective on the question presented by this case as well as a vital interest in its proper resolution. Accordingly, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners.

Respectfully submitted,

EUGENE O. DUFFY *
GREGORY W. LYONS
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Amicus

* Counsel of Record

November 8, 1991

---

[4] For example, in the wake of this Court's determination in the case of *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S.Ct. 2439 (1991), West Virginia has refunded taxes collected in violation of 4 U.S.C. § 111 to civilian federal retirees. However, it continues to litigate its ability to discriminate against military retirees. *See Brown et al. v. Mierke*, C.A. No. 90-3341, Circuit Court, Kanawha County, West Virginia. Similarly, at oral argument upon remand in the case of *Harper v. Virginia Dept. of Taxation*, 241 Va. 232, 401 S.E.2d 868, *vacated and remanded*, 111 S. Ct. 2883 (1991), *on remand* (Nos. 900770 and 900792, Va., argued September 17, 1991), the Attorney General of Virginia has raised this same issue.

QUESTION PRESENTED

Whether the Kansas Income Tax Act violates constitutional or statutory principles of intergovernmental tax immunity, as recently applied in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), by favoring retired state and local employees over retired members of the United States armed forces.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	1
A STATE COURT IS NOT AT LIBERTY TO CREATE AN EXCEPTION WHERE CONGRESS HAS DECLINED TO DO SO	2
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	2a

TABLE OF AUTHORITIES

CASES Page

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) ..... *passim*
Freytag v. Commissioner, —— U.S. ——, 111 S. Ct. 2631 (1991) 3
McCarty v. McCarty, 453 U.S. 210 (1981) 5
Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376 (1960) 3, 12, 13

CONSTITUTINONAL PROVISIONS

U.S. Const., Art. I, § 8 ..... 2, 3, 4

STATUTES

4 U.S.C. § 111 ..... 1, 5, 11, 12
5 U.S.C. § 8312 11
5 U.S.C. § 8347 10
10 U.S.C. § 1331 10
18 U.S.C. § 207 11
22 U.S.C. § 3948(a) 11
22 U.S.C.A. § 4041 et seq. (West 1990 and Supp. 1991) 4
26 U.S.C. § 414(d) 8, 9
26 U.S.C. §§ 3121(a)(5)(E),(i)(2),(m) and (v)(3) 9
26 U.S.C.A. § 219(a), (b) (Supp. 1991) 8, 9
26 U.S.C.A. § 3101(a) (Supp. 1990) 6
26 U.S.C.A. § 3121(a) (Supp. 1990) 6
26 U.S.C.A. § 3121(i)(2) (Supp. 1990) 7
28 U.S.C. § 377 (West Supp. 1991) 4
28 U.S.C.A. § 178 4
28 U.S.C.A. § 371 (West 1968 and Supp. 1991) 4
33 U.S.C.A. § 853o (West 1986 and Supp. 1991) 4
42 U.S.C. § 403(b),(f)(5)(A) and (f)(5)(C)(i) 6
42 U.S.C.A. § 212 (West 1991) 4
42 U.S.C.A. § 409(d) 4
42 U.S.C.A. § 410(l) and (m) 4
K.S.A. 79-32, 117(a) 3, 7
K.S.A. § 74-4923(b) (Supp. 1990) 11
K.S.A. § 74-4925(1)(a) and (4) (Supp. 1990) 11
P.L. 99-335, 100 Stat. 514 (1986) 3, 4, 10

TABLE OF AUTHORITIES—Continued

	Page
P.L. 100-690, 102 Stat. 4181 (1988)	4
P.L. No. 84-881, 70 Stat. 870 (1956)	6
P.L. No. 89-365, 80 Stat. 32 (1966)	7
P.L. No. 97-448, § 103, 96 Stat. 2365, 2375 (1983)	9
MISCELLANEOUS	
5 C.F.R. § 831.301	10
59 Cong. Rec. 6300 (April 29, 1920)	11
84th Cong., 2d Sess., AN ANALYSIS OF PUBLIC LAW 881 (H.R. 7089)	6
1956 U.S. Code Cong. & Admin. News 3976	6
H.R. Rep. No. 1118, 89th Cong., 1st Sess. (1965)	7, 8
M. Weinstein, MERTENS LAW OF FEDERAL INCOME TAXATION § 25C.12 (1988)	8
Priv. Ltr. Rul. 8007048 (Nov. 21, 1979)	9
Priv. Ltr. Rul. 8227053 (Apr. 9, 1982)	8
Priv. Ltr. Rul. 8725094 (Mar 30, 1987)	9
Report of the National Advisory Commission on Law Enforcement, April 1990, OCG-90-2 Law Enforcement Pay	4
Rev. Rul. 56-82, 1956-1 C.B. 59	13
Rev. Rul. 57-75, 1957-1 C.B. 28	13
S. Rep. No. 99-166, 99th Cong., 1st. Sess. (1985)	12
Survivor Benefit Act: Hearings on H.R. 7089 Before the Senate Comm. on Finance, 84th Cong., 2d Sess. (1956)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-611

KEYTON E. BARKER and
PAULINE BARKER, *et al.*,
Petitioners,

v.

STATE OF KANSAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

---

BRIEF *AMICUS CURIAE* ON BEHALF OF THE RETIRED OFFICERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth in the motion accompanying this brief.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Kansas presents a question of far-reaching importance: whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111,

for retired members of the armed forces? The decision of the Kansas Supreme Court that it was at liberty to use state standards of review to create an exception where Congress has declined to do so conflicts with the decisions of this Court and the will of Congress. Such a result, if permitted to stand, threatens grave harm to substantial federal interests. As this Court has recognized, matters implicating the national defense are exclusively the province of Congress.

Amicus respectfully submits that this Court should grant the petition in this case to correct the erroneous result of the court below on an issue involving the important concern of national defense. *See* U.S. Const., Art. I, § 8, Cls. 12, 13 and 14. (App. B, *infra* at 2a.)

If there should be any doubt as to the need for certiorari, *amicus* requests that the Court seek the views of the Solicitor General of the United States because of the important federal interests implicated in the decision below.

A STATE COURT IS NOT AT LIBERTY TO CREATE AN EXCEPTION WHERE CONGRESS HAS DECLINED TO DO SO.

In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are subject to § 111." *Id.* at 807. In resolving the question of the validity of the Michigan Income Tax Act, this Court held that "the relevant inquiry is whether the inconsistent tax treatment is *directly related to*, and *justified by*, 'significant differences between the two classes.'" *Id.* at 816 (emphasis added) (citation omitted). However, in resolving the issue of whether Kansas may discriminate in favor of its own retirees and against military retirees, the Kansas Supreme Court ignored the two

pronged *Davis* test and utilized a state standard of review to uphold the Kansas scheme. *See* Petition at 9a.[1]

Neither the lower court's opinion nor the position of the State demonstrates how the differential treatment of military retirees is "based on" the alleged differences between the two classes. *See Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 384 (1960); *Davis*, 489 U.S. at 816-17. The only distinguishing factor set forth in Kansas' exemption provisions is the source of the compensation. There is no evidence of any kind which establishes that the Kansas legislature intended to single out military retired pay for discrimination because of any actual or perceived differences from other forms of retirement income. To the contrary, except for the discrimination here in issue, the Kansas legislature has treated military retired pay in a manner similar to other retirement income. *See* K.S.A. 1990 Supp. 72-32, 117(a).[2]

The court below based its decision on distinctions which are legally insufficient to permit a state to discriminate against military retired pay. However, a state court is " 'not at liberty to create an exception where Congress has declined to do so' ". *Freytag v. Commissioner*, —— U.S. ——, 111 S. Ct. 2631, 2636 (1991) (citation omitted).

It is within the exclusive province of Congress to make provisions for the retirement of the officers and employees of the United States. Congress has accomplished this through the enactment of a variety of retirement plans, the provisions of which incorporate important policy and personnel decisions made by Congress.[3] *See* U.S. Const., Art. I, § 8, Cl. 18 (App. B, *infra* at 2a).

---

[1] In addition, the court below ignored the fact that Kansas' scheme discriminates against all federal retirees except those receiving a civil service annuity. *See* Petition at 16, 28a-29a.

[2] The statute is set forth in the Petition at 47a.

[3] *See, e.g.*, Federal Retirement System Act of 1986, P.L. 99-335, 100 Stat. 514 (1986); Public Health Services ["PHS"] retirees paid

From time to time, these various retirement plans have been modified to reflect the considered determinations of Congress that changing personnel needs, unintended inequities, omissions, or intervening court decisions necessitate change to meet specific personnel needs of the United States. *See, e.g.*, Federal Retirement System Act of 1986, P.L. 99-335, 100 Stat. 514 (1986).[4] Whatever differences that may exist between military retired pay and other forms of governmental retirement income, exist because Congress has created them pursuant to the Constitution and in furtherance of national interests. *See* U.S. Const. Art. I, § 8, Cls. 12, 13, 14 and 18. (App. B, *infra* at 2a.) However, in the exercise of that power, Congress has not consented to the discriminatory state taxation of military retired pay.

The decision below rests on the determination of the Kansas Supreme Court that military retired pay may be taxed differently from other government retirement plans.[5] However, in reaching this conclusion, the court

---

under 42 U.S.C.A. § 212 (West 1991); National Oceanic and Atmospheric Administration ["NOAA"] retirees paid under 33 U.S.C.A. § 853o (West 1986 and Supp. 1991); Foreign Service retirees paid from the Foreign Service Retirement and Disability Fund, 22 U.S.C.A. § 4041 et seq. (West 1990 and Supp. 1991); retired Justices and Judges of the United States paid under 28 U.S.C.A. § 371 (West 1968 and Supp. 1991); retired Claims Court judges paid under 28 U.S.C.A. § 178; and retired bankruptcy judges and magistrates paid under 28 U.S.C. § 377 (West Supp. 1991).

[4] *See also* Report of the National Advisory Commission on Law Enforcement, April 1990, OCG-90-2 Law Enforcement Pay, which Commission was established by the Anti-Drug Abuse Act of 1988, P.L. 100-690, 102 Stat. 4181 (1988), and charged to provide Congress with a comprehensive study of issues related to the recruitment, retention and morale of career federal law enforcement officers.

[5] The court below and the State rely upon federal cases which have treated military retired pay as "reduced pay for reduced services" for purposes of interpreting and applying certain federal statutes. However, none of those cases has characterized military

below ignored the manner in which Congress has treated military retired pay.[6] In fact, Congress has never referred to military retired pay as "reduced pay for reduced service" and has recognized military retired pay as a governmental retirement plan.[7]

Contrary to the decision below, the "relevant inquiry is whether the inconsistent *tax treatment* is directly related to and justified by, 'significant differences between [the favored class (retirees of state and local subdivisions of Kansas) and this disfavored class (military retirees of the United States)].'" *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 816 (1989) (emphasis added) (citation omitted). The purpose of the inquiry relates to the ability of a state to discriminate for purposes of taxation against employees of the federal government. Therefore, the focus of the inquiry should be upon the real differences and similarities of the two classes. Here, there are no "significant differences" that justify the discriminatory taxation of military retirees.

Congress has, for federal tax purposes, consistently treated military retired pay in the same manner as any other pension. For example, in 1956 Congress amended the Social Security Act ("SSA") and the Federal Insurance Contributions Act ("FICA") to bring military per-

---

retired pay as current compensation for income tax purposes and none of those cases even suggest that Congress intended retired pay to be treated as current compensation for purposes of taxation.

[6] Indeed, it apparently was of no moment to the court below that Congress specifically provided in the Public Salary Tax Act of 1939 that the Act was to be construed by reference to the Internal Revenue Code. Sec. 206 of the Act provided that: "[t]he terms used in this Act shall have the same meaning as when used in Chapter 1 of the Internal Revenue Code."

[7] In *McCarty v. McCarty*, 453 U.S. 210, 223 n.16 (1981), this Court recognized that the military retired pay of officers is a "personal entitlement" which has characteristics of both deferred and current compensation.

sonnel under the contributory system of social security in the United States. Pub. L. No. 84-881, 70 Stat. 870 (1956). *See* 42 U.S.C.A. §§ 409(d), 410(l) and (m) (Supp. 1991); 26 U.S.C.A. §§ 3121(m) and (n) (Supp. 1990).[8] One of the primary purposes of the Social Security System is to provide benefits upon retirement when employees no longer expect to receive significant amounts of compensation for their services.[9] Congress has funded the Social Security program through FICA taxes imposed on employers and employees based upon specified percentages of "the wages (as defined in section 3121(a)) received by [an individual] with respect to employment." 26 U.S.C.A. § 3101(a) (Supp. 1990). Congress has defined the term "wages" broadly to include "all remuneration for employment" unless otherwise excluded. 26 U.S.C.A. § 3121(a) (Supp. 1990). However, in extending Social Security coverage to military personnel, Congress specified that "basic pay" for active duty service would be included in the term "wages" subject to FICA taxes,

---

[8] The purpose of this legislation was to "cover military personnel into the contributory Social Security System, thereby supplementing military retirement and survivors benefits." S. Rep. No. 2380, 85th Cong., 2d Sess. 1, reprinted in 1956 U.S. Code Cong. & Admin. News 3976, 3977. For members of the federal military, "[c]ontributions and benefits [are the] same as civilian employment." House Select Comm. on Survivor Benefits, 84th Cong., 2d Sess., AN ANALYSIS OF PUBLIC LAW 881 (H.R. 7089) 5 (Comm. Print 1956). *See* Survivor Benefit Act: Hearings on H.R. 7089 Before the Senate Comm. on Finance, 84th Cong., 2d Sess. 60 (1956) (statement of Captain David L. Martineau) (regarding employee contributions, "military service personnel . . . would be treated exactly the same as any other citizen who is now covered by social security.").

[9] Participants in the Social Security System become eligible to receive old age benefits at age 62; however, the amount of benefits they otherwise would be entitled to receive are reduced if the participant receives compensation "on account of work" in excess of specified levels. Military retired pay, since it is retirement income, does not reduce social security benefits. *See* 42 U.S.C. § 403(b), (f)(5)(A) and (f)(5)(C)(i).

but specifically excluded retired pay from the meaning of "wages" subject to FICA taxes. 26 U.S.C.A. § 3121(i)(2) (Supp. 1990).

Similarly, in 1966, Congress amended the Internal Revenue Code to extend to military retirees the same tax treatment extended to civil service retirees and other retirees under qualified pensions for purposes of income, estate and gift taxation of survivor annunities. Pub. L. No. 89-365, 80 Stat. 32 (1966). The legislative history of this Act establishes that Congress determined that:

> [M]embers (or former members) of the uniformed services should be treated essentially the same as retirees under the civil service program and under other qualified pension or annuity plans. Your committee has concluded that there is *no substantial grounds* for distinguishing the *tax treatment* of the plan for the uniformed services from these other plans . . . As a result, your committee has concluded that these uniformed services retirees should be treated in the same manner as pensioners under qualified plans.

H.R. Rep. No. 1118, 89th Cong., 1st Sess. 4-5 (1965).[10]

In addition, the position of the State adopted by the court below with respect to the "Individual Retirement Account" ("IRA") is in direct conflict with Congressional enactments and the settled interpretation of the Internal

---

[10] Interestingly, by virtue of Kansas' adoption of a piggyback system of state taxation, the Kansas legislature has determined for purposes of its state income tax scheme that "there is no substantial grounds for distinguishing the tax treatment of the plan for the uniformed services from these other plans." However, the decision in this case leads to the anomalous result that the Kansas legislature at the same time with respect to the very same subject of taxation supposedly reached the exactly opposite conclusion that the same plan for the uniformed services was *significantly different*. *See* K.S.A. 79-32, 117(a), Petition at 47a. *Amicus* respectfully submits that such a result is untenable.

Revenue Service ("IRS"). Congress and the IRS have treated military retired pay as a pension or deferred compensation for purposes of applying federal income tax provisions which limit the amount a taxpayer may claim as a deduction for contributions to an Individual Retirement Account ("IRA"). The deduction is limited to the lesser of $2,000 or *the amount of the taxpayer's compensation.* 26 U.S.C.A. § 219(a), (b) (Supp. 1991) (emphasis added). The IRS has determined that government retirement benefits under section 414(d), including military retired pay, are not current *compensation* within the meaning of the term as used by Congress in limiting IRA deductions:

> Section 1.219-1(c) of the Income Tax Regulations provides that the term 'compensation', for purposes of sections 219 and 220 of the Code, means wages, salaries, professional fees, or other amount derived from or received from personal services actually rendered . . . . Congress has interpreted this regulation to mean that benefits received under a pension plan or other plan of deferred compensation is not compensation for purposes of sections 219 and 220 of the Code. *See* Staff of the Joint Committee on Taxation, 97th Cong., 2d Sess., General Explanation of the Economic Recovery Tax Act of 1981 (Comm. Print December 29, 1981), page 197, n.1.
>
> This interpretation is consistent with the legislative intent behind the enactment of the tax law relating to IRAs. *The purpose of an IRA is to give employees or self-employed individuals the opportunity to set aside some of their earnings for retirement.* See S. Rep. No. 93-383, 93d Cong., 1st Sess. 131 (1973), 1974-3 C.B. Supp. 210. *To base an IRA deduction upon contributions made with retirement pay would be inconsistent with this purpose.*

Priv. Ltr. Rul. 8227053 (Apr. 9, 1982) (emphasis added). *See also* M. Weinstein, MERTENS LAW OF FEDERAL INCOME TAXATION § 25C.12 at 58 (1988).

The IRS has specifically determined in other letter rulings that the military retirement system is a *retirement plan* under section 414(d) of the Code for the benefit of its employees. *See* Priv. Ltr. Rul. 8725094 (Mar. 30, 1987); Priv. Ltr. Rul. 8007048 (Nov. 21, 1979). Congress has specifically adopted the interpretation of the IRS by amending section 219(f)(1) of the Code to exclude from the term "compensation" "any amount received as a pension or annuity [or] as deferred compensation." Technical Corrections Act of 1982, Pub. L. No. 97-448, § 103, 96 Stat. 2365, 2375 (1983).[11]

Certainly, if Congress had intended to permit individual states to discriminate against military retirees for purposes of taxation, it would not have acted to insure that military retired pay is afforded the same treatment as all other retirement benefits, including pension benefits paid by state and local subdivisions to their retirees. *See, e.g.*, 26 U.S.C. §§ 3121(a)(5)(E), (i)(2), (m) and (v)(3). Similarly, if there were truly *significant differences* between military retired pay and pensions paid by state and local subdivisions, Congress would have concluded that there were *substantial grounds* for distinguishing the tax treatment of military retired pay from other retirement plans such as those exempted by Kansas. However, as previously discussed, Congress found to the contrary. *See* H.R. Rep. No. 1118, 89th Cong., 1st Sess. 5 (1965).

---

[11] The Kansas Supreme Court's attempt to distinguish the treatment of military retired pay under the Kansas' scheme for purposes of the IRA deduction is unavailing. Prior to the amendment of 219(f)(1) of the Code, the interpretation of the IRS in denying an IRA deduction for military retired pay and other governmental pension payments was premised on the recognition that such payments, including military retired pay, were from governmental plans under 26 U.S.C. § 414(d). Indeed, implicit in Kansas' piggyback system of taxation is recognition of Congress' singular classification of these plans under section 414(d), which for purposes of this case, Kansas now attempts to disavow by urging that they are *significantly different*.

Moreover, if military retired pay were *significantly different* from a governmental pension plan, it certainly would not be subject to a conversion privilege for retired military members who continue their employment with the civil service upon retirement from the military service. However, Congress has specifically recognized that the entitlement to military pay is just like the creditable federal service taken into account for the determination of any other pension benefit and has expressly provided under the authority of 5 U.S.C. § 8347 that, at the option of the retired military member, the entitlement to military retired pay may be converted to a civil service pension.[12] *See* 5 C.F.R. § 831.301.

The Court below also held that Kansas' discriminatory scheme was justified because of the noncontributory nature of the military retirement system.[13] The Court con-

---

[12] In connection with the enactment of the Federal Retirement System Act of 1986, Congress specifically recognized the importance of the portability of retirement benefits upon the recruitment and retention of a motivated career work force as well as permitting midcareer mobility. *See* S. Rep. No. 99-166, 99th Cong., 1st Sess. 4-5 (1985).

[13] The decision below suggests that its holding with respect to military retired pay is also supported by the defendant's assertions that: (1) federal military retirees remain members of the armed forces of the United States after they retire from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court-martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; and (4) federal military retirees are subject to involuntary recall. *Amicus* respectfully suggests that these assertions are nothing more than red herrings. Certainly, if this was the basis upon which the discrimination could be justified, the scheme would not discriminate against those persons receiving military retired pay who are not subject to one or more of the so-called alleged differences. For example, former members of the reserves who receive military retired pay under 10 U.S.C. § 1331a while in a civilian status are not subject to any of these so-called differences. Similarly, many civilian retirees of the federal government are

cluded that the "federal government's method of funding prevents Kansas from taxing a portion of the military retirement benefits before such benefits are received." Petition at 26a. However, Kansas itself does not tax, at *any* time, the contributions that state or local governmental employers make to fund a state employee's pension. Petition at 26a.[14] As this Court recognized in *Davis*, a "tax exemption truly intended to account for differences in [the funding of] retirement benefits would not discriminate on the basis of the source of those benefits, as [Kansas'] statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees [which were previously taxed]." *Davis*, 489 U.S. at 817. Accordingly, for purposes of 4 U.S.C. § 111, it is obvious that Kansas' proffered rationale fails "because an evenhanded application of the rationale would have resulted in inclusion of some [state retirees] in the disfavored class." *Id.*[15]

---

subject to perfectly analogous post-retirement restrictions, including sanctions for criminal misconduct (5 U.S.C. § 8312), restrictions on post-retirement employment (18 U.S.C. § 207) and recall (22 U.S.C. § 3948(a)). However, none of these provisions in any way diminishes the fact that the pensions paid to retirees of the federal government are deferred compensation for personal services rendered. *See* 59 Cong. Rec. 6300 (April 29, 1920) (statement of Representative Hamil: "pensions are not gratuities . . . they should be looked upon as deferred wages—as payments of wages which were not disbursed at the time they were earned.") Contrary to the assertion of the defendants below, the so-called diferences represent nothing more than a considered determination of Congress of what is in the national interest for those who pursue a career of federal service.

[14] *See also* K.S.A. §§ 74-4923(b) and 74-4925(1)(a) and (4) (Supp. 1990), which provisions are reprinted in the Petition at 51a-53a.

[15] It is ironic, indeed, that the court below justified Kansas' scheme on this basis when the Internal Revenue Service has consistently adhered to the doctrine of intergovernmental tax immunity and the provisions of the Public Salary Tax Act of 1939 by recognizing that the part of current pension payments received by state

Under the doctrine of intergovernmental tax immunity, "the State [must] treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 385 (1960). Consistent with this doctrine, 4 U.S.C. § 111 prohibits the discriminatory state taxation of "salaries, retirement benefits, and other forms of compensation . . . on account of the source of the compensation." *Davis*, 489 U.S. at 810. Nothing in the doctrine of intergovernmental tax immunity or the statute differentiates between military and other federal employees. As this Court recognized in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* at 815 n.4. In the instant case, the Kansas Supreme Court acted impermissibly when it chose to utilize a state standard of review to measure Kansas' discriminatory scheme.

---

and local retirees—which is attributable to employer contributions for years prior to 1939, is exempt from the federal income tax in accordance with the requirements of the Act. *See* Rev. Rul. 56-82, 1956-1 C.B. 59; Rev. Rul. 57-75, 1957-1 C.B. 28.

CONCLUSION

Contrary to the decisions of this Court in *Phillips* and *Davis*, the Court below utilized a state standard of review in creating a distinction without a difference so as to justify a result which violates the express will of Congress. *Amicus* respectfully urges that the petition for a writ of certiorari to the Supreme Court of the State of Kansas should be granted and that the decision below should be reversed.

Respectfully submitted,

EUGENE O. DUFFY *
GREGORY W. LYONS
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Amicus

* Counsel of Record

November 8, 1991

APPENDICES

APPENDIX A

The military associations listed below have joined with TROA in the filing of this motion and attached brief:

Air Force Association (AFA)

Association of Military Surgeons of the United States (AMSUS)

Chief Warrant and Warrant Officers Association, U.S. Coast Guard (CW&WOA)

Commissioned Officers Association of the U.S. Public Health Service (COA)

Fleet Reserve Association (FRA)

Marine Corps League (MCL)

Marine Corps Reserve Officers Association (MCROA)

National Guard Association of the U.S. (NGAUS)

National Military Family Association (NMFA)

Naval Reserve Association (NRA)

Navy League of the U.S. (NLUS)

Reserve Officers Association (ROA)

Society of Medical Consultants to the Armed Service (SMCAF)

The Jewish War Veterans of the United States of America (JWV)

The Military Chaplains Associations (MCA)

The Retired Enlisted Association (TREA)

U.S. Army Warrant Officers Association (USAWOA)

U.S. Coast Guard Enlisted Association (CGEA)

USCG Chief Petty Officers Association (CPOA)

BEST AVAILABLE COPY

APPENDIX B

Article I, Sec. 8 of the United States Constitution provides in relevant part:

> The Congress shall have power
>
> * * * *
>
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> To provide and maintain a navy;
>
> To make rules for the government and regulation of the land and naval forces;
>
> * * * *
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.